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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 505

MARTIN G. HOBAN,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Carl L. Shipley and Rufus W. Peckham, Jr., attorneys for Martin G. Hoban, petitioner herein, respectfully request on his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled case.

OPINION DELIVERED IN THE COURT BELOW TO BE REVIEWED

The opinion delivered in the United States Court of Claims is No. 116-66, decided April 17, 1967, and is set out *infra* in the appendix at page A-1.

JURISDICTION

As grounds on which to invoke jurisdiction of this Court, petitioner relies upon Title 28 U.S. Code, Section 1255, and alleges and verily believes that the special and important reasons justifying a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 are:

The opinion of the Court below decides an important question of federal law which has not been, but should be, settled by this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether chronic alcoholism is an illness constituting medical disability rather than "cause" for discharge of a federal employee under Section 14 of the Veteran's Preference Act of 1944?
2. Is it a denial of due process of law within the purview of the Fifth Amendment to initiate disciplinary (i.e., discharge) proceedings against a chronic alcoholic federal employee rather than retirement proceedings as is customary with employees suffering from a disabling illness?

STATUTE INVOLVED

Section 14, Veterans Preference Act of 1944 (5 U.S.C.A. 863) in pertinent part:

> "No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service . . . shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such *cause* as will promote the efficiency of the service for reasons given in writing . . , stating any and all reasons, specifically and in detail, for any such proposed action . . ." (Emphasis supplied)

CONSTITUTIONAL PROVISION INVOLVED

Amendment 5

"No person shall be . . . deprived of life, liberty or property without due process of law . . ."

STATEMENT

Petitioner, a 10-point veteran's preference eligible and career federal civil servant, was employed as an Industrial Security Specialist, GS-9, by the Department of the Navy at an installation in New York City.

By a letter dated May 14, 1965, petitioner was advised by his appropriate superior that it was proposed to remove (i.e., discharge) him from his position on the grounds of "excessive unauthorized absence," specifically on April 15, 16, 19, 20-23 and May 3, 5-7, 1965. In his reply of May 26, 1965, to this proposed notice of removal, petitioner admitted to the absences and stated that they were due to the fact that he was suffering from a chronic illness which, although immediately induced by the ingestion of alcohol, was of a constitutional nature. On July 14, 1965, the Department of the Navy (Supervising Inspector of Naval Material) rejected petitioner's explanation and directed his removal effective July 23, 1965. Timely appeals were taken to the U. S. Civil Service Commission, New York Region, and thereafter to the Board of Appeals and Review, both of which sustained the Department's adverse action.

On April 12, 1966, petitioner filed a petition in the United States Court of Claims, seeking judgment for back pay, alleging that his dismissal was unlawful on the grounds that the issue of his chronic alcoholism was not considered in the proceedings below. On April 17, 1967, that Court denied petitioner's motion for summary judgment (see appendix at page A-1); granted defendant's cross-motion for summary judgment and dismissed the petition. This petition for a Writ of Certiorari follows therefrom.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the gravamen of the Court of Claims decision was ". . . that there is no issue in this case of whether plaintiff was a chronic alcoholic or of whether such status is or is not a disease for the purpose of removal from the federal service . . ." To be sure, the issue was not seriously delved into in the administrative proceedings. However, it is of paramount importance to note that subsequent to the initiation of the administrative proceedings two landmark decisions by two separate circuit courts of appeals were rendered on the subject of alcoholism. *Driver v. Hinnant*, 356 F.2d 761, decided January 22, 1966, by the United States Court of Appeals, Fourth Circuit, held that a North Carolina statute prohibiting intoxication in public could not be applied to a chronic alcoholic; further that alcoholism is a chronic illness, hence not a crime or misdemeanor. Shortly thereafter, on March 31, 1966, the United States Court of Appeals for the District of Columbia Circuit held in *Easter v. District of Columbia*, 361 F.2d 50, that a chronic alcoholic "may not be punished" (at page 53 of the opinion). Much of the Court's rationale in *Easter* was based upon its interpretation of the Act of Congress of August 4, 1947, entitled "Rehabilitation of A oholics," 61 Stat. 744, c. 472, now embodied in the Code of Laws of the District of Columbia, Title 24, Section 501 (1961 edition as amended). Thus we see a clear Congressional and judicial mandate that alcoholics are sick people and must be treated as such.

Both *Driver* and *Easter* concerned themselves with criminal prosecutions for public drunkenness, however, this Court is urged to recognize that dismissal from federal employment via disciplinary proceedings is tantamount to the imposition of a criminal penalty. In *Powell v. Zuckert*, 366 F.2d 634 (1966), the United States Court of Appeals for the District of Columbia Circuit likened discharge proceedings to those that involve the imposition of criminal sanctions and cited in support thereof *Peters v. Hobby*, 349 U.S. 331, 75 S. Ct. 790 (1955); *Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400

(1959), and *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524 (1886). The dissents of Justices Douglas and Black in *Williams v. Zuckert*, 371 U.S. 531, 83 S. Ct. 403 (1963), would therefore appear to be particularly appropriate to this case:

> ". . . We have heretofore analogized these administrative proceedings . . . to proceedings that '*involve the imposition of criminal sanctions*'[1]; and we have to look to 'deeply rooted principals of criminal law for guidance . . .' The stigma now attached to him will follow him whatever employment he seeks. The requirements of due process provided by the Fifth Amendment should protect him against this harsh result . . ." (Emphasis supplied)

It can hardly be argued that in terms of its end result one who has been dismissed from his livelihood is better off than one who has received a relatively mild fine or jail sentence. As stated by this Court in *Watkins v. United States*, 354 U.S. 178, 77 S. Ct. 1173 (1957),

> "The Bill of Rights is applicable . . . to all forms of governmental action."

Surely then it must logically follow that to dismiss (as opposed to involuntarily retire) a chronic alcoholic from his livelihood cannot be other than a denial of due process of law, and that chronic alcoholism is no more "cause" for removal within the meaning of the Veteran's Preference Act than is the measles or tuberculosis.

As further authority in support of this premise, the Court's attention is respectfully drawn once again to the Fourth Circuit Court of Appeals, which on April 6, 1966, indicated in *Lewis v. Celebrezze*, 359 F.2d 398, that recovery of benefits under the Social Security Act ought not to be barred on the grounds of the origin of the disability (alcoholism).[2]

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[1] Citing *Greene* and *Peters, supra.*

[2] In that case, the District Court's decision denying benefits was affirmed on the grounds that the claimant's impairments (including alcoholism) were not shown to be substantial enough to preclude him from gainful employment.

If this Court accepts the rationale of the foregoing citations, then most assuredly it must follow that a federal employee suffering from a chronic illness—alcoholism—cannot be punished by forfeiture of his livelihood as if he were a common criminal, and that alcoholism is not "cause" within the meaning of the Veteran's Preference Act for disciplinary dismissal. The Court is therefore most respectfully urged to accept this opportunity to adjudicate this most compelling question.

CONCLUSION

WHEREFORE, the premises considered, petitioner submits there are special and important reasons justifying the grant of a writ of certiorari in this case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

MARTIN G. HOBAN

v.

THE UNITED STATES

No. 116-66

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, Judges.

ORDER

This case comes before the court on plaintiff's motion and defendant's cross-motion for summary judgment. Upon consideration thereof, together with the opposition thereto, and the briefs of the parties, without oral argument, the court finds that there is no issue in this case of whether plaintiff was a chronic alcoholic or of whether such a status is or is not a disease for the purposes of removal from the federal service; in the administrative proceedings plaintiff did not prove, nor attempt to prove, that he was a chronic alcoholic but insisted that he was not. On the ground that plaintiff has failed to show any procedural violation in his dismissal, since the charge against him was clear and specific and there is no reason to believe that he was removed on a ground not charged,

IT IS ORDERED that defendant's cross-motion for summary judgment be and the same is granted, plaintiff's motion for summary judgment is denied and plaintiff's petition is dismissed.

BY THE COURT

APR 17 1967

/s/ Wilson Cowen
Chief Judge

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 605

MARTIN G. HOBAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Decisions affecting employment in the federal civil service have traditionally been viewed primarily as matters for executive judgment, with judicial review confined to the question whether the employee's procedural rights were fully safeguarded. The present record reveals compliance with procedural requirements at all stages of the case, and petitioner does not argue otherwise.

2. Instead, petitioner seeks to raise the claim that he was discharged because of chronic alcoholism and

that this is an impermissible ground because "alcoholics are sick people and must be treated as such" (Pet. 4). As the Court of Claims correctly noted, however, "there is no issue in this case of whether plaintiff was a chronic alcoholic" (Pet. App. A-1). Petitioner never raised that issue at the administrative level, where his removal was sustained. Accordingly, the court below properly refused to consider it. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411. The record clearly establishes that petitioner was charged with "excessive unauthorized absence." His case was heard on that charge and his employment was terminated because the evidence before the Civil Service Commission amply sustained it.

We respectfully submit that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER, 1967

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